Supreme Court, U.S.
FILED
JUN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2015

In The

Supreme Court of the United States

October Term, 1988

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.

Petitioners,

v.

THE CELOTEX CORPORATION,
STANDARD-TAYLOR INDUSTRIES, INC.,
STANDARD ROOFING COMPANY OF NEW ORLEANS,
INC., ROBBINS TAYLOR, and PIERRE F. CARRIERE

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT THE CELOTEX CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

George Frazier
Lemle, Kelleher, Kohlmeyer,
Dennery, Hunley, Moss & Frilot
601 Poydras Street
21st Floor, Pan-American Life
Center
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

Attorney for Respondent
The Celotex Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the failure of a Clerk of Court to timely return trial exhibits in accordance with Local Rules of Court violate the constitutional guarantee against unreasonable searches and seizures?

2. Are there any circumstances in which examination by the judiciary of trial exhibits filed under seal could prejudice a party's constitutional right to a fair trial, and, if so, are those circumstances present here?

3. Are the penalties and sanctions imposed on Petitioners in this case unconscionable in light of the lower courts' determinations that Petitioners' claims were frivolous?

4. Is a Petition for a Writ of Certiorari filed four years after the Judgment sought to be reviewed timely?

LIST OF PARTIES AND AFFILIATED CORPORATIONS

The parties to the proceedings below were Petitioners Olympia Company, Inc. and Olympia Roofing Company, Inc., and Respondents The Celotex Corporation, Standard-Taylor Industries, Inc., Standard Roofing Company of New Orleans, Inc., Robbins Taylor, and Pierre F. Carriere.

The parent company of Respondent The Celotex Corporation is Jim Walter Corporation. Affiliates of The Celotex Corporation (other than wholly owned subsidiaries) are Jim Walter International Sales Corporation, Jim Walter Research Corp., JWC Holdings Corporation, Apache Building Products Company, and Jasper Corp.

TABLE OF CONTENTS

Page

Counterstatement of Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 2

Jurisdiction 2

Counterstatement of the Case 2

Reasons Why the Petition Should be Denied 4

Conclusion 6

APPENDICES:

A. Order in *Olympia Co. v. The Celotex Corp.*, No. 84-3850 (5th Cir. Mar. 1, 1989) A1

B. Memorandum Opinion in *Olympia Co. v. The Celotex Corp.*, No. 89-3181 (5th Cir. Apr. 21, 1989) A2

C. Memorandum Opinion in *Olympia Co. v. The Celotex Corp.*, No. 76-373 "A" (E.D. La. Feb. 8, 1989) A5

TABLE OF AUTHORITIES

Page

CASES:

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 4

Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69 (1979) 4

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 4

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 4

United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377 (1956) 5

United States v. Grinnell Corp., 384 U.S. 563 (1966) 5

STATUTES:

Sherman Act § 1, 15 U.S.C. § 1 2

Sherman Act § 2, 15 U.S.C. § 2 2

Clayton Act § 2 (as amended by the Robinson-Patman Act), 15 U.S.C. § 13 2

Clayton Act § 3, 15 U.S.C. § 14 3

Clayton Act § 4, 15 U.S.C. § 15 3

28 U.S.C. § 1912 3

28 U.S.C. § 1927 ..... 3, 4

RULES:

Supreme Court Rule 17.1(a) 1

Federal Rule of Appellate Procedure 38 3

Local Rule 42.2 of the United States Court of Appeals for the Fifth Circuit 4

No. 88-2015

In The

Supreme Court of the United States

October Term, 1988

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.

Petitioners,

v.

THE CELOTEX CORPORATION,
STANDARD-TAYLOR INDUSTRIES, INC.,
STANDARD ROOFING COMPANY OF NEW ORLEANS,
INC., ROBBINS TAYLOR, and PIERRE F. CARRIERE

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT THE CELOTEX CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition involves disputed issues of fact, concerns only settled principles of law, and presents no ground specified in Rule 17.1(a) of this Court. Accordingly, Respondent The Celotex Corporation respectfully requests that the Court deny the Petition for Writ of

Certiorari to Review the Decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 771 F.2d 888 (5th Cir. 1985). Memorandum decisions of that Court dated March 1 and April 21, 1989 have not been reported. They are reprinted in Appendices A and B of this Brief.

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 597 F.Supp. 285 (E.D. La. 1984). The memorandum decision of that Court dated February 8, 1989 is reprinted in Appendix C of this Brief.

JURISDICTION

Petitioners' attempts to obtain review or reconsideration by the United States Court of Appeals for the Fifth Circuit of its decision reported at 771 F.2d 888 (5th Cir. 1985) were untimely and defective. That judgment is definitive, and the Petition is consequently untimely.

COUNTERSTATEMENT OF THE CASE

This case commenced on February 5, 1976 when Petitioners filed an action alleging, *inter alia*, that Respondents had engaged in conduct violating Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2, Clayton Act § 2 (as amended by

the Robinson-Patman Act), 15 U.S.C. § 13, and Clayton Act § 3, 15 U.S.C. § 14. Petitioners sought treble damages from Respondents under Clayton Act § 4, 15 U.S.C. § 15. After over eight years of discovery, the District Court ruled that Petitioners had proved neither a violation of the antitrust laws, cognizable injury flowing from violation of those laws, nor damages. The Court accordingly granted Respondent's Motion for Summary Judgment on November 9, 1984, and Judgment dismissing the case with prejudice was entered on November 15, 1984. Petitioners perfected a timely appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed on September 23, 1985. That Court also found the appeal frivolous and remanded the case for assessment of attorneys' fees and double costs against Petitioners and their counsel under Federal Rule of Civil Procedure 38 and 28 U.S.C. §§ 1912 and 1927. On January 22, 1986, a hearing on the amount of sanctions to be awarded was held, and on February 13, 1986 the District Court directed the Clerk of Court to enter a Judgment for Respondent's expenses and attorneys' fees. The Judgment was satisfied on March 12, 1986. Almost three years later, Petitioners filed documents captioned (a) "Motion and Order for New Trial and Recall of Sanctions and Penalties" in the Court of Appeals, and (b) "Motion for New Trial" in the District Court. On February 9, 1989, the District Court dismissed the Motion for New Trial as frivolous (Appendix C). On March 1, 1989, the Court of Appeals denied Olympia's Motion for New Trial and Recall of Sanctions (Appendix A). On March 14, 1989, the Court denied a Petition for Rehearing of the March 1, 1989 Order. Despite the above, on March 7, 1989, Petitioners filed a Notice purporting to

appeal the decision of the District Court reported at 597 F.Supp. 285. Respondents' Motions to Dismiss were granted on April 21, 1989, and sanctions of $15,000 and attorneys' fees, costs, and expenses were imposed against Petitioners and their counsel under 28 U.S.C. § 1927 and Local Rule 42.2 of the United States Court of Appeals for the Fifth Circuit (Appendix B).

Rehearing was denied on May 12, 1989, and a Petition for Writ of Certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners seek review of judgments that have long since become definitive. Even were that not the case, the Petition is demonstrably without merit. It is difficult to comprehend, let alone articulate, Petitioners' complaint. Apparently, Petitioners contend that Clerks and Judges of United States Courts either invaded Petitioners' privacy by examining Exhibits, denied them a fair trial by failing to do so, or were improperly influenced by materials submitted by Petitioners.

The opinions of the trial court and the Fifth Circuit illustrate that the claims Petitioners seek to resurrect lack legal and factual substance. All antitrust claims asserted in the underlying action involve only settled principles of law, and most have been disposed of by recent decision. *E.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *Brunswick Corp. v. Pueblo Bowl-O-Mat*,

Inc., 429 U.S. 477 (1977); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. E. I. du Pont De Nemours & Co.*, 351 U.S. 377 (1956). Consequently, Petitioners can make no colorable argument that they have been deprived of a fair trial by the misconduct of Judges, Clerks, or counsel. What, then, is left – a claim that Judges are barred by a Protective Order from examining documents submitted by litigants? Petitioners have identified no right, constitutional or otherwise, that could conceivably be violated by Judges reviewing Petitioners' own documents.

Similarly, Petitioners fail to explain what injury they have suffered. They lost a case because the law and facts were against them and they were deservedly penalized for taking frivolous appeals. Whatever the nature of the injury Petitioners may be claiming, it is clear that it does not implicate the Constitution of the United States. Even if it arguably did, this is hardly the case to decide the matter.

The issues presented by this case are unclear and undeveloped. Petitioners' theories are illogical and self-contradictory. Any alleged constitutional violations are unlikely to occur again. The case concerns no general principles, but is limited to its peculiar facts. There is, quite simply, no reason to hear this case.

The trial judge and six judges of the United States Court of Appeals for the Fifth Circuit have on three occasions found Petitioners' attempts to appeal or re-open this case frivolous. Sanctions have been imposed by two different panels of the Fifth Circuit. The matter does not merit this Court's attention.

CONCLUSION

It is self-evident that the decisions of the District Court and the Court of Appeals reported at 597 F.Supp. 285 and 771 F.2d 888 are definitive. They are *res judicata* in the truest sense of the phrase. Petitioners do not purport to have discovered new evidence. Indeed, the Petition is expressly premised on old evidence. It is clear that the Petition is no more than an attempt to circumvent principles of repose established beyond need of citation. Petitioners' actions are in complete disregard of the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and Rules of Court. The Petition ought to be dismissed out of hand.

June 28, 1989

Respectfully submitted,

GEORGE FRAZIER
LEMLE, KELLEHER, KOHLMEYER
DENNERY, HUNLEY, MOSS & FRILOT
601 Poydras Street
21st Floor, Pan-American Life
Center
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

Attorney for Respondent
The Celotex Corporation

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3850

USDC #CA 76-373 A

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.,

Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana
(Filed Mar. 1, 1989)

O R D E R:

IT IS ORDERED that the motion of appellants to recall the judgment of this Court and to remand the cause to the district court for a new trial is DENIED.

/s/ THOMAS M. REAVLEY
UNITED STATES CIRCUIT
JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3181

OLYMPIA COMPANY, INC., and
OLYMPIA ROOFING COMPANY,

Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(Filed April 21, 1989)

Before GEE, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of appellees Celotex and Standard Roofing to dismiss the appeal and for sanctions are GRANTED pursuant to Local Rule 42.2 and 28 U.S.C. § 1927. The cause is remanded to the district court for the determination of an appropriate amount of attorneys fees, costs and expenses to be added to the award of sanctions which we enter here and paid personally by counsel for appellants, the Court having determined that this entire proceeding constitutes an unreasonable and vexatious multiplication of litigation. And the Court having noted that an earlier award of sanctions in the

amount of $11,537.86 has not deterred appellant's counsel from instituting and persisting in this attempted resurrection of a long-dead matter, the Court awards a sanction of Fifteen Thousand Dollars in addition to the aforesaid § 1927 award pursuant to Rule 11, F.R.C.P. It is so

ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3181

OLYMPIA COMPANY, INC., and
OLYMPIA ROOFING COMPANY,

Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING
(May 12, 1989)

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
United States Circuit Judge

APPENDIX C

MINUTE ENTRY
FEBRUARY 9, 1989
SCHWARTZ, J.

OLYMPIA COMPANY, INC.

VS.

THE CELOTEX CORPORATION, ET AL

CIVIL ACTION
NO. 76-373
SECTION "A"

(Filed Feb. 8, 1989)

This matter is scheduled to come before the Court for hearing on the motion of plaintiffs for new trial. The Court is of the opinion no oral argument on the motion is necessary and the matter is hereby taken under submission without oral argument.

This Court dismissed plaintiffs' claims on the merits on motion for summary judgment and was affirmed by the Fifth Circuit in 1985. *See Olympia Co. v. Celotex Corp.*, 597 F.Supp. 285, *aff'd* 771 F.2d 888 (5th Cir. 1985). The gravamen of plaintiffs' motion for new trial is contradictory: On the one hand, plaintiffs allege they are entitled to a new trial because certain documents were not properly maintained under seal. On the other hand, plaintiffs allege the government improperly restricted and made difficult access to the documents in question.

The motion was apparently provoked by the return of certain boxes of sealed documents to the plaintiffs with the "seals broken". Plaintiffs also allege they were improperly denied access to their own documents in preparing their appeal.

As to the first contention, plaintiffs misperceive the Clerk's actions in maintaining documents "under seal".

The term "under seal" is a term of art, meaning only that the documents in question are not maintained as a matter of public record, but are rather kept apart from the main record in a vault or other location not readily accessible to the public. The Clerk's office does not place any type of official wax or other seal on such documents, although it may from time to time tape boxes of documents closed. Thus, the "breaking of seals" on boxes has absolutely no significance whatsoever.

Moreover, even accepting as true plaintiffs' contention that none of the documents in question was entered into evidence, holding documents for in camera inspection by definition permits the Court to review in chambers any such documents it deems necessary for the resolution of a case. The same holds true for any reviewing Court. Such in camera review is not limited to reading the documents in the presence of counsel of record, but is accomplished whenever the Court deems it necessary to read a document. There has been no showing by the plaintiffs that any person outside of Court and government personnel involved in processing and handling Court records has had access to the documents in question. There has been no showing that any party filed a motion for leave to review documents held in camera and that such request was improperly granted.

Moreover, any matters inhibiting plaintiffs' preparation of their appeal should have been called to the Court's attention four years ago. The Court is also at a loss to perceive how the plaintiffs could have been prejudiced by the Court's holding their documents in storage, since the documents presumably belong to the plaintiffs,

and presumably they, as owners of the documents, would have been aware of their contents.

The motion for new trial is accordingly DISMISSED as frivolous.

/s/ C.S. Jr.
